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# INTERNATIONAL LAW

*Section Newsletter*

**Vol. 10, No. 1 • Spring 1997**

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# INTERNATIONAL LAW

*Section Newsletter*

**Vol. 10, No. 1 • Spring 1997**

**CALIFORNIA INTERNATIONAL LAW SECTION NEWSLETTER**

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**CHAIR'S LETTER**

As predicted in our last Newsletter, 1997 is off to a roaring start for the International Law Section and all of its Members. This is going to be another great year!

In January, we began the year with a series of our innovative Teleseminar programs. These programs -- which we will continue to schedule at varying times throughout the year -- allow any of our Members the luxury of dialing in to an interactive telephonic seminar featuring prominent speakers from around the country (all from the convenience of the Member's desk, home or whatever phone location they choose. Our five different programs in January -- some of which were offered twice, and all of which offered specialty MCLE credits in ethics, law practice management or elimination of bias -- were very well attended and garnered rave reviews. Kudos to Grant Barnes, Linnet Harlan and each of the other Members of our Teleseminars Subcommittee who worked so hard to put these valuable programs together!

Following up on our January successes, our Section put on a great educational program in San Diego on February 27, 1997, entitled: "Enforcement of Contracts in Mexico: Litigation, Arbitration & Bonding." The program played to a hotel room packed to capacity, and was so well-prepared and informative that the Section has decided to run it again in Los Angeles later in the year. Special thanks to John McNeece, Guillermo Marrero and the others who spoke at and/or helped put on this excellent program.

All of us are also looking forward to the Section's first ever "Stress Buster's Weekend" coming up on March 14-16, 1997, at The Palms Resort in Palm Springs. As of this writing, I am just readying to head out to this one-of-a-kind opportunity to simultaneously network, learn and relax. Susan Liebler deserves all of the credit for this unique event, and we will report back to those of you who missed it in our next issue!

If you are one of those unfortunate souls who has missed out on all of the activities so far, do not despair -- 1997 still has a host of good things to come!

Our Section will be putting on several fascinating programs at the State Bar's annual Spring Section Education Institute at the Squaw Creek Resort in Lake Tahoe on May 16-18, 1997. Topics will include current issues on patent development and technology licensing, the Foreign Corrupt Practices Act, tax planning, immigration, representing foreign clients in U.S. litigation, and legal policies concerning the Internet.

Do make sure you circle August 1-5, 1997 on your calendar! This is when our Section will hold its annual International Law Weekend in San Francisco concurrently with, and in direct cooperation with, the American Bar Association's Annual Meeting (August 1-5). Headed up by our program co-chairs Rob Cox and Steve Smith, and ably overseen by my Vice Chair, David Hirson, big plans are underway to put on the best International Law Weekend ever! We expect hundreds of members of the ABA's International Law & Practice Section to descend on the City by the Bay, along with the 100+ foreign legal practitioners who, as in years past, will again be participating with our Section as part of U.C. Davis' Law in the U.S.A. Program. This summer program certainly promises to be the best international event of the year!

Please keep a look out for announcements on additional Teleseminar programs to be held during the year. Also, more information will be forthcoming soon regarding our Section's programs to be held at the State Bar's

Annual Meeting on September 11-14, 1997, in San Diego, and at the Annual Fall Section Education Institute on November 14-16, 1997, at the Del Coronado Resort in San Diego.

Finally, be sure to stay up-to-date on the latest Section news and activities by logging onto the Section's web site [[www.calbar.org/ils.htm](http://www.calbar.org/ils.htm)].

Looking forward to seeing you soon!

Jeff Shields

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## **NORTHERN CALIFORNIA CAREER DAY FOR LAW STUDENTS**

Once again, the Section reached out to law students in an effort to share experiences and give practical advice on careers in international law.

The Northern California Career Day for law students was presented to a crowd of enthusiastic students on Saturday, March 22, at Booth Auditorium in Boalt Hall, U.C. Berkeley. A panel discussion was held in the a.m., followed by an informal brown bag lunch.

PLANS ARE UNDERWAY FOR A SOUTHERN CALIFORNIA CAREER DAY Watch this Newsletter and the Section website [[www.calbar.org/ils](http://www.calbar.org/ils)] for further details.

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**IMMIGRATION LAW UPDATE -- MARCH 1997**

**INS Publishes New Regulations**

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**New INS Regulations**

On January 3, 1997, a proposed rule was published in the Federal Register (Vol. 62, No. 2, Page 444). The rule is to implement the provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

Congress directed that the implementing regulations effecting Title III-A of IIRIRA take effect on April 1, 1997, and therefore that the regulations be published by March 1, 1997. A 30-day comment period ending on February 3, 1997, was permitted with a note that a 120-day comment period would be permitted on the Interim Rule when published by the beginning of March, prior to the development of a Final Rule.

The regulations include several provisions which substantially change the bases for denying admission to aliens and removing aliens already in the United States. The IIRIRA also makes substantial changes to the procedures for removing aliens who are inadmissible or deportable, revises several existing waivers of inadmissibility and forms of relief from removal, and adds others. Space constraints do not permit a full discussion on this new immigration reform law. Please see our last quarterly Section Newsletter (Vol. 9, No. 4, Winter 1996).

**INS Begins Direct Mail Program for Adjustment of Status**

Effective January 29, 1997, all business-based adjustment of status cases must be filed at one of the four regional Service Centers having jurisdiction over the residence of the immigrant applicant. The applicant no longer has the option of filing at the local district office of the INS. The INS must submit fingerprints of the applicant to the FBI and the case cannot be finally adjudicated until the INS receives the FBI clearance.

These cases will take at least 150 days to complete. In addition, the requirement relating to the various vaccinations which applicants must have before finalizing their permanent residence, continues to cause great concern because of the uncertainty of the method of implementation of the requirement. A report is awaited from the Center for Disease Control which hopefully will clarify this issue.

**New Employment Authorization Document**

The INS is beginning to introduce a new, more secure employment authorization document (EAD). Form I-766 may now be used by employers and employees for purposes of employment verification eligibility when completing Form I-9.

Form I-766 has certain security and quality control features intended for government use. It also has several features visible to the naked eye, which will help employers determine whether the card is genuine and whether it relates to the person who presents it. The visible features include several holograms; a photograph of the alien; microprinting; and a number and bar code, which are etched into the surface and feel rough to the touch. In addition, the edge of the card appears to have a thin red stripe between two white lines, as if the card were a sandwich with a thin red filler.

### **IIRIRA Targets Tax-Dodging Expatriates**

Any alien who is a former citizen of the United States who officially renounces United States citizenship and who is determined by the Attorney General to have renounced United States citizenship for the purpose of avoiding taxation by the United States is excludable. By deeming tax-avoiding expatriates excludable, the new law prevents these individuals from obtaining visas or being granted admission to the United States, unless waivers are obtained from the INS.

For further information contact David Hirson at (714)251-8844, e-mail [immigrationlaw@msn.com](mailto:immigrationlaw@msn.com), or fax (714)251- 1545.

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**TAX UPDATE - MARCH 1997**

**IRS Issues Final "Check-the-Box" Rules on Entity Classification**

Charles R. Conradi  
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Late last year, the Internal Revenue Service (IRS) issued final regulations, the so-called "check-the-box" regulations (the "Regulations"), which generally allow taxpayers to elect to treat unincorporated entities for U.S. federal income tax purposes either as corporations or as partnerships, or to disregard the entity (if the entity has only one member). These Regulations, which are generally effective as of January 1, 1997 (with selected grandfather provisions), will simplify entity classification and improve taxpayers' ability to select the form of their business entity for federal income tax purposes. This article discusses the background and application of these Regulations, as well as issues presented by state conformity with the rules.

**Background**

Under the existing law, unincorporated entities doing business are generally treated as corporations for federal tax purposes if they have three or more "corporate characteristics"; (i) continuity of life, (ii) free transferability of interests, (iii) centralization of management, and (iv) limited liability. Prior to issuance of the Regulations, taxpayers could usually structure a limited liability company or foreign partnership into lacking at least two of these corporate characteristics, but such structuring was burdensome and, based on ambiguity in the governing law, results were often uncertain. Due to the formalistic nature of the old entity classification rules, the facility with which taxpayers planned around them, and the considerable resources devoted by the government to providing guidance in this area, the elective classification regime embodied in the Regulations was adopted by the government.

**Application of Rules**

The Regulations automatically treat certain business entities as corporations. These include, (i) domestic corporations, (ii) state joint-stock companies, and (iii) specifically designated foreign entities (so-called "per se corporations") including the French *societe anonyme* and the UK public limited company. An entity that is not automatically treated as a corporation (an "eligible entity") may elect to be treated as a corporation, a partnership (if two or more members) or disregarded (if a single member). The election may be effective on a specified date that is not more than 75 days before or 12 months after the date the election is filed. Elections generally cannot be changed more than once in a 60-month period. An election to change classification may have significant tax consequences to the entity and its owners. As an example, a change from corporate to partnership status will be considered a liquidation of the corporation and a contribution of assets to the new partnership, with the potential for recognition of taxable gain. Thus, care should be exercised in making such elections.

## **Planning Implications and State Conformity Issues**

In addition to making achievement of desired entity classification cheaper, simpler and faster than under current law, the Regulations afford taxpayers a clearer path to certain tax- planning goals. Taxpayers may utilize losses generated by foreign entities to offset their income, maximize their use of foreign tax credits (for example, by eliminating foreign corporate tiers to permit utilization of foreign tax credits, flowing through law-taxed foreign source earnings to increase limitation and avoiding 10-50 basket tax credit limitations) and minimize exposure to passive foreign investment company and subpart F taxation.

Few states have made their position on the Regulations known, although most states are expected to conform with federal law. California is considering conformity with the Regulations, but is concerned with the potential for revenue loss. States which use federal taxable income as their starting point will generally accept the check the box rules by default, at least for state income tax purposes. It has been reported that the California Franchise Tax Board wants to impose a toll charge on entities which elect to check the box, to offset revenues lost through the forfeiture of corporate tax. Where states confirm to the Regulations, taxpayers may utilize the rules to dilute state taxable income and factors, minimize taxable dividends and reduce the number of filings in separate return states. Pitfalls of the election involve potential loss of desirable tax attributes (such as Net Operating Losses), as well as possible sales tax imposition on deemed transfers of assets to a new entity.

## **Conclusion**

The Regulations are a laudable effort by the IRS to bring true tax simplification and classification certainty. In the preamble to the Regulations, however, the IRS indicated its intent to continue to carefully monitor the use of partnerships in international contexts. Consequently, if planning results seem "too good to be true" - they might be undone by future regulations.

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## NEWS FROM AROUND THE WORLD

**Editor:** Glen W. Price

**Student Reporters:**

Cristian Ramorino, Loyola Law School

Roger Barrett James, Loyola Law School

### **SPOTLIGHT**

#### **Children Charged With Crimes Against Humanity**

Under recent legislation in Rwanda, 2,200 youths who are currently being held in prison will face trial for crimes against humanity. The children, ranging in age between 14 and 18 years old are charged with participation in the 1994 genocide of approximately 800,000 Tutsis, and face prison sentences of up to twenty years. Although children have been used to commit wartime atrocities in the past, this is the first time in history that children have been charged with crimes against humanity. UNICEF stepped in to provide separate prison facilities for the children who had been crowded in with adults and special training for judges and court personnel, but refrained from condemning the prosecutions because it could find no legal or moral ground upon which to seek an amnesty for children accused of participating in genocide.

There was concern at the agency that aiding in the prosecution of children in any way might offend some western donors to UNICEF, however, those on the ground who have dealt with the children of families who were butchered during the genocidal massacres could not justify requesting a general amnesty. The fact that the Rwandan law substitutes a twenty-year sentence for children under eighteen, rather than the usual death or life sentences given to adult offenders made the decision easier.

### **PUBLIC INTERNATIONAL LAW**

#### **U.S. Vetoes United Nations Resolution on Israeli Settlements**

In a move that upset many of the United States Arab allies in the middle east, the U.S. vetoed a United Nations resolution to condemn the planning and construction of new Israeli settlements in East Jerusalem. Although the resolution was sponsored by the Europeans and did not contain any binding elements other than a general condemnation, the United States vetoed the resolution due to the negative effect it would have on the peace process. President Clinton was very critical of the Israeli decision and its implications for the peace process, but was unwilling to go along with the U.N. action.

#### **Rwanda War Crimes Tribunal Under Fire**

The United Nations International Criminal Tribunal for Rwanda came under intense criticism from U.N. Secretary-General Kofi Annan following an internal probe which found mismanagement, financial abuse, and incompetence. The government in Rwanda, which is carrying out its own trials and has been suspicious of the U.N. tribunal, found an unlikely ally in the U.N. inspector general, who stated that without substantial changes in tribunal operations, the Rwandans "will be right to suspect that justice delayed is justice denied." So far, the

tribunal has indicted only twenty-one individuals for genocide and is conducting its first trial, whereas almost 100,000 inmates currently await trial for genocide related crimes in Rwanda.

## **WORLD TRADE ORGANIZATION**

### **WTO Agreement To Open Telecommunications Markets**

In February, members of the World Trade Organization reached an agreement to liberalize telecommunications markets around the world. The telecommunications agreement was one of the final pieces of business left from the 1993 agreement which created the trade body. Under the new accord, members agreed to allow foreign competition within the domestic phone market after January 1998, access to rivals on satellites, and the drafting of more transparent rules of competition. Although only 67 of the 130 WTO signatory countries voted for approval, those countries represent over 90% of the world telecommunications market. Despite the potential for growth in the 670 billion dollar market being stressed by European Union Trade Commissioner, Leon Brittan, and U.S. Trade Representative Charlene Barshefsky, there are already storm clouds on the horizon for the new agreement as the U.S. and E.U. have taken contrary positions on the interpretation of language concerning satellite TV and radio broadcasting.

### **WTO Rules On Japan's Liquor Tax Law**

In accordance with its November ruling that Japan unfairly taxes imported spirits, a WTO arbitrator ruled in February that Japan must eliminate all discriminatory provisions of its liquor tax law within 15 months. This ruling marks the culmination of a long and firm U.S. commitment to the issue since Japan ignored a similar ruling under GATT in 1987. The arbitrator denied a Japanese request to delay compliance for a period of two to five years while changes were made to its liquor laws. The ruling was praised by U.S. officials as a strong endorsement of the obligation to "expeditiously" comply with WTO panel rulings under the new mandatory dispute resolution system.

### **Chinese Offers Concessions at Geneva**

The Chinese delegation negotiating for China's entry into the World Trade Organization made a concession long sought by the United States in March when it announced that it would allow Chinese companies to deal and trade directly with foreign business without the necessity of government intermediaries and red tape. China offered to take the action three years after entering the WTO. In another concession, China agreed to implement the WTO agreements protecting intellectual property immediately upon entry. Although U.S. trade negotiators were positive about the developments, they urged caution considering China's past record of promises which have not been enforced, particularly with respect to intellectual property protection.

## **PRIVATE INTERNATIONAL LAW**

### **AFRICA**

#### **Ivory Coast Bans Sale of Elephant Tusks**

In a move to save the nation's dwindling elephant herds, the Ivory Coast passed a decree banning the trade in elephant tusks and placing restrictions on imports and exports of ivory in order to prevent cross border traffic from poachers in neighboring countries. Although Ivory Coast is a signatory to the convention banning ivory sales, finished goods made from ivory are commonly sold. The decree will not effect the trade in existing goods, but will ban the trade in unfinished tusks.

### **ASIA**

#### **South Korean Labor Reform Law Goes Down Under Weight of Union Protest**

After two months of strikes and declining public opinion, South Korea's ruling party agreed to revise a labor law passed in December which would have reformed the labor market, allowing Korean businesses to lay off workers without court approval. Under the original law, which was passed in the early morning without notice to the opposition parties, businesses would immediately be able to lay off workers, but union reform which would

allow the formation of umbrella unions similar to the AFL-CIO was to be postponed for at least two years. The new compromise version of the law would reverse the situation, allowing formation of umbrella unions, while postponing the implementation of the right to lay off workers. Business leaders were disappointed by the compromise, claiming that they are now in worse shape than they were under the pre-reform law, which almost guaranteed lifetime employment, but severely curtailed labor activities.

### **Court-appointed Defense Team of Japanese Cult Guru Resigns**

On March 6th, the court-appointed lawyers defending the cult guru accused of masterminding the sarin gas attacks on the Tokyo subways tendered their resignations. Osamu Watanabe, chief of the twelve lawyer defense team, stated that the court was trying to railroad the defendant, Asahara, through trial, due to the widely held presupposition that he is guilty. The criminal trial of Asahara and his followers has been called Japan's "Trial of the Century" in analogy to the O.J. Simpson trial and it is uncertain whether the court will accept the defense team's resignations.

### **Japan To Increase Its Power Over Economic Sanctions**

Japan will revise its laws to allow the government to impose economic sanctions without United Nations' Security Council approval. Current laws prevent Japan from imposing economic sanctions on a country without the backing of the U.N. Security Council. Such laws led to criticism of Japan when it delayed imposing economic sanctions on Iraq for invading Kuwait in 1990. Japan currently has economic sanctions on Iraq, Libya, Angola, Liberia, and Rwanda.

### **China's New Defense Law Forces Military To Swear Allegiance To The Communist Party**

On March 6th, Chinese Defense Minister Chi Haotian introduced a draft "Defense Law", stating that the armed forces of the People's Republic of China accept the leadership of the Communist Party. The draft law is expected to pass through parliament. The law is designed to give legal effect to the long tradition of Communist party leadership in the military and to cement central government control in the event of any rebellions including a possible altercation with Taiwan. Although the political impact of the law is apparent, the law would also establish joint central government control over the vast economic and commercial holdings of the Chinese military establishment.

### **Vietnam Supreme Court Judge Imprisoned For Bribery**

In the latest of several high-profile corruption cases, Vietnamese Supreme Court Justice Bui Van Tham was found guilty of taking bribes in at least one case over which he presided. According to the state press, Tham was sentenced to two years in prison for receiving bribes of about \$4,000. Although the state presented taped conversations during which the judge allegedly discussed bribe money, his conviction was considered a forgone conclusion given that criminal defendants are typically assumed guilty unless proven innocent in Vietnamese court.

## **EUROPE**

### **French Newspaper Fined For Offending Moroccan King**

Le Monde, a French newspaper, was found guilty of offending Moroccan King Hassan following a report of drug trafficking in his country. Although recognizing that the newspaper was performing its job, the appeals court found that Le Monde did offend Hassan, violating a French press law which forbids offending the head of state of a foreign country. Consequently, the paper's editor and journalist were fined 500 francs (\$80) and had to pay nominal damages of one franc (\$0.20) to Hassan.

### **Russia's Lower House Approves Bill To Allow Opposition Activity**

Russia's lower house of parliament, the Duma, passed a bill which would allow activities opposed to presidential or governmental policy. The "opposition activities" permitted include public criticism of public officials, holding public assemblies, and or the voicing of ideas or views contrary to government policy. Activities which might encourage social, racial, ethnic or religious hatred would not be permitted. The bill must

still be approved in the upper house, the Federation Council, in order to become law.

### **Three Swiss Banks form a \$68 Million Fund for Holocaust Victims**

Following intense pressure from Israel and the United States including threatened boycotts and potential revocation of the operating licenses of Swiss banks in New York, three major Swiss banks set up a 68 million dollar fund to provide compensation to Jews, gays, Gypsies, and other Holocaust victims whose unclaimed accounts or wealth stolen by the Nazi regime ended up in the hands of Swiss banks.

### **Switzerland Proposes A \$4.7 Billion Holocaust Fund**

In the wake of potential pressure based on recent revelations of Nazi plundered gold being hidden in Swiss banks, the Swiss government has announced plans for a \$4.7 billion fund to help victims of the Holocaust. The fund would be paid for by proceeds from the sale of gold reserves of the Swiss National Bank. The gold that will be sold was purchased as bullion from the Nazis during World War II. Despite international pressure, the fate of the fund is uncertain given that it will require two constitutional amendments and passage through the Swiss parliament.

### **Spanish Supreme Court Justice Murdered**

On February 10, Spanish Supreme Court Judge Rafael Martinez Emperador was gunned down outside his home in Madrid. Although no one has claimed responsibility for the assassination, many suspect that the Basque separatist group ETA is responsible. The Court has been involved in a confrontation with the ETA's political wing called the Herri Batasuna coalition.

## **MIDDLE EAST**

### **Pakistani Court Rules on Woman's Right to Autonomy**

A Pakistani Court voted 2-1 in favor of ordering the release of a 22-year old college student who was married without the permission of her father, a follower of fundamentalist Islamic teaching. The father held the woman incommunicado for eleven months in their family home, claiming that the marriage was void without his permission. The case was an important test of whether women have legal autonomy in Pakistan and how strictly the civil law should conform to Islamic tenants.

### **Pakistan To Get Tougher On Crime**

The Pakistani government announced that it will introduce bills in the National Assembly which will make gang rapes and "unnatural offenses" against children younger than 10 years old punishable by death. Current rape laws have a penalty of 25 years of imprisonment and a flogging. Other changes include a smoking ban in public offices, educational institutions, hospitals, airport lounges, trains, and all domestic flights.

## **NORTH AMERICA**

### **U.S. Criticizes Colombia's Efforts in the Drug War/Praises Mexico As An Ally**

For the second year in a row, the Clinton administration refused to certify Colombia's anti-drug program, citing a lack of progress by Colombia in fighting its drug cartels. The refusal of certification will result in a denial of economic aid and raises the possible imposition of economic sanctions. A primary reason for the refusal to certify is that Colombia's President Ernesto Samper allegedly received drug cartel money to assist his campaign in 1994. Recently, Colombia made attempts to gain certification by passing laws which raise prison terms for druglords, however, U.S. officials say that jails do not prevent the druglords from running their cartels. Mexico was re-certified this year as an ally in the drug war, drawing criticism from Congress where a resolution condemning Mexico's anti-drug efforts and calling for decertification passed committee and headed for the House floor.

### **Ninth Circuit Interprets Commercial Activity Exception To Foreign Sovereign Immunity**

In *Adler v. The Federal Republic of Nigeria*, the Ninth Circuit recently affirmed a decision to refuse sovereign

immunity to Nigeria based on the "commercial activity" exception. The Foreign Sovereign Immunities Act (FSIA) provides an exception to immunity in U.S. courts when state acts are commercial in nature and have a direct effect on the United States. The Court ruled that because payment was to be made in a New York bank, "New York was the place of performance of Nigeria's ultimate contractual obligation" and thus, "failure to satisfy that obligation necessarily had a direct effect in the United States."

### **New York Halts Diplomatic Immunity for Parking Tickets**

Citing an intolerable situation wherein diplomats park wherever they please and then hide behind diplomatic immunity, Mayor Rudolph Giuliani and the new ambassador to the United Nations Bill Richardson announced a get tough policy with respect to diplomatic vehicles. Under the new policy, the state department will ask foreign embassies to surrender the plates of diplomats who do not pay parking tickets within one year and vehicles which are impounded for illegal parking will have the plates sent directly to the state department. The Russian delegation to the U.N. immediately took offense to the new plan, stating that it was a mere pretense for the real issue, which is that New York no longer wishes to house the U.N. Headquarters. The Russian delegation has amassed 15,000 unpaid tickets totaling \$720,000 in the first six months of 1996 alone.

### **Canada To Send Aid And Expertise To Modernize The Cuban Tax System**

The Canadian International Development Agency signed an agreement with Cuba in March to modernize the Cuban tax agency. Canada will establish a \$C3.6 million dollar project to help Cuba reform its tax agency and set up a modern and automated tax administration similar to that used in Canada and the United States. The project is part of Canada's commitment to aiding Cuba in making market reforms and prodding Cuba to greater openness through economic engagement. Although Cuba abolished taxes in 1967, it has re-implemented them with the onset of limited private enterprise and the introduction of foreign investment and workers. Canada's continued policy of engagement is likely to ruffle feathers in the U.S., especially in Congress, which passed the Helms-Burton law aimed at punishing foreign companies that do business in Cuba last year.

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## **ENFORCING CONTRACTS AND JUDGMENTS IN MEXICO**

The International Law Section's February seminar in San Diego enjoyed a sell-out crowd. The event was held at the Mission Valley Marriott on February 27, 1997. Seminar Chair, John McNeece, an Advisor to the Section's Executive Committee, pronounced the program "a great success." McNeece, who practices in San Diego, said that the sign up for the program -- over 70 attorneys and businesspeople, demonstrates the importance of U.S.-Mexico business for Southern California.

The seminar covered how to plan, structure, negotiate, and enforce contracts in Mexico, with commentary from two Mexican lawyers from Tijuana, and three U.S. lawyers from San Diego who specialize in cross-border business law, litigation, and arbitration:

- Lic. Luis Gallardo, a Mexican business lawyer with Gallardo, Ogarrio y Oseguera in Tijuana, spoke on "Planning and Structuring Contracts in Mexico."
- McNeece, with Luce, Forward, Hamilton & Scripps, LLP in San Diego, spoke on "Security for Contractual Obligations in Mexico."
- Lic. Sergio Fillad Fahme, a litigator from Tijuana, gave a presentation on "Litigation in Mexico over a Mexican Contract."
- Richard Page, with Page & Busch LLP in San Diego, spoke on "Appropriate Dispute Resolution ("ADR") in North America."
- Guillermo Marrero, with Gray Cary Ware & Friedenrich in San Diego, discussed the intricacies of "Enforcing Judgments in Mexico."

THE SECTION PLANS TO REPEAT THIS PROGRAM ONCE AGAIN THIS FALL IN LOS ANGELES.

Watch the Newsletter and the section's web site [[www.calbar.org/ils](http://www.calbar.org/ils)] for further details.

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## THE RETURN OF THE JAPANESE "ZAIBATSU"

John McDermott<sup>\*</sup>

Prior to the Second World War, Japan's economy was dominated by holding companies - then known as "zaibatsu" - enormous industrial combines generally controlled by a single family. When the war ended, U.S. occupation forces disbanded the zaibatsu, blaming them for leading Japan into the war. Japan subsequently enacted a new antitrust law - the Antimonopoly Act of 1947 (AMA) - drafted by Occupation Forces lawyers and, not surprisingly, based on the U.S. antitrust laws. Article 9 of the AMA specifically prohibits holding companies - companies whose principal business is to control the business activities of other companies through ownership of the stock of the companies - from operating in Japan, and the zaibatsu have been illegal in Japan ever since.<sup>1</sup>

Although the AMA has undergone several important changes in the past 50 years, the blanket prohibition on holding companies has been retained. But that is about to change. Unless somehow prevented from doing so, the Japanese government plans to remove the ban on holding companies, effective in April 1998.<sup>2</sup>

It took weeks of "intense deliberations" for the ruling coalition government - made up of the Liberal Democratic Party (LDP) the Social Democratic Party (SDP) and New Party Sakigake - to reach an agreement to allow holding companies. The biggest "sticking point" was the "specific asset guideline" that would invoke the Japanese Fair Trade Commission's (JFTC) scrutiny. The three parties finally agreed that any corporate group with total assets of more than 15 trillion yen [\$130 billion] would have to obtain the approval of JFTC, which could ban the holding company if concluded the group was likely to become a monopoly or oligopoly.<sup>3</sup>

At the other end of the scale, they agreed to allow a corporate group with total assets of 300 billion yen [\$2.6 billion] or less to establish a holding company without having to notify the JFTC.

Japanese corporate and political leaders are quick to point out that the holding companies that are to be allowed will not lead to a return of the old-style zaibatsu. Indeed, they insist that holding companies are vital to ensuring Japan's economic recovery by allowing Japanese corporations to cut their high labor costs and compete better against American rivals.<sup>4</sup>

It seems unlikely that holding companies will solve all of the problems facing the Japanese economy today but if they do help Japanese corporations become more competitive the news will not be warmly received on this side of the Pacific.

### **Labor is worried**

Japanese union leaders fear that gains in competitiveness could come at the expense of Japanese labor if the creation of such holding companies leads to "down-sizing" and layoffs. They have threatened to oppose the proposed changes unless they are allowed to negotiate directly with the managers of the holding companies, rather than with the managers of the subsidiaries.

## Some companies are already lining up

Nippon Telegraph & Telephone Corp. apparently will be one of the first Japanese companies to reorganized under the new law. Japan's Posts and Telecommunications Ministry is planning to propose a bill that would split NTT, Japan's largest domestic telecommunications carrier, into two domestic telephone companies and one international carrier under a holding company.<sup>5</sup>

Other Japanese companies may not be as eager to take advantage of this new law. There seems to be an agreement that tax reform is also needed. Industry analysts suggest that unless the new law is accompanied by changes allowing companies to pay taxes on a consolidated basis, the impact of removing the ban on holding companies will be limited. A survey by Mitsubishi Research Institute showed that only 19 out of 330 questioned companies would create holding companies if consolidated tax returns were not allowed, but 190 indicated they would if such a tax system were introduced.<sup>6</sup>

There may be other tax problems. An official of a major Japanese commercial bank estimated that it would cost his bank around ¥100 billion (\$80 million) in asset transfer taxes alone if the bank were divided into a holding company and subsidiaries.

But it seems clear that, like General MacArthur, the Zaibatsu are returning. Only time will tell whether they reach the power of their pre-war ancestors and what effect, if any, they will have on U.S - Japan relations.

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### Endnotes

\* Professor of Law, Loyola Law School, Los Angeles.

<sup>1</sup> The AMA does not prohibit a company that controls another company by means of its stockholdings, as long as the controlling company continues to operate its principal business. Danny Abir, MONOPOLY AND MERGER REGULATION IN SOUTH KOREA AND JAPAN: A COMPARATIVE ANALYSIS, 13 Int'l Tax & Bus. Law. 143 (1996).

<sup>2</sup> The proposal has the supported of the country's most influential business group - Keidanren - and by the ever powerful Ministry of International Trade and Industry (MITI). Holding-company push gains momentum, 2/10/97 Nikkei Wkly. (Japan) 2, 1997 WL 9507056.

<sup>3</sup> The LDP had wanted the asset limit to be 20 trillion yen or more in line with the recent Fair Trade Commission (FTC) proposal, while the SDP had sought an upper limit of 10 trillion yen. Fears of a possible re-emergence of the "zaibatsu" are particularly strong within the SDP. Japan/Holding Companies -3: Companies Hope For Tax Changes, 2/25/97 Dow Jones Int'l News Serv. 05:22:00.

<sup>4</sup> Some see this as a chance to split inefficient conglomerates into small, more focused and legally distinct operations working under a holding-company umbrella, thereby eliminating the need for Japan's cross-shareholding relations or *keritsu*. The banking industry in particular sees in holding companies a way to speed a consolidation after a prolonged crisis with bad property loans.

<sup>5</sup> Bill on NTT Will Go to Cabinet, 3/7/97 Asian Wall St. J. 7, 1997 WL-WSJA 3798810.

<sup>6</sup> The government has indicated it may allow a consolidated tax system and modify other tax burdens for the fiscal year starting April 1, 1998. Japan/Holding Companies -3: Companies Hope For Tax Changes, 2/25/97 Dow Jones Int'l News Serv. 05:22:00.

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*California*  
**INTERNATIONAL LAW**  
*Section Newsletter*

**Vol. 10, No. 1 • Spring 1997**

**International Law Section Guide to  
NAVIGATING THE WORLD WIDE WEB**

Glen Price  
Los Angeles, CA

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This feature is the fifth in a series focusing on useful web sites for international research and practice. This issue continues with a look at various resources for arbitration and alternative dispute resolution on the web. Log into the Section's web site at [www.calbar.org/ils.htm](http://www.calbar.org/ils.htm) to see prior guides to other areas of law.

**ADR ON THE WEB**

Although alternative dispute resolution has only recently become a hot topic in domestic law, arbitration has long been an important and integral facet of international commercial practice. This is reflected in the plethora of legal resources available on the web.

**International Chamber of Commerce - International Court of Arbitration** [[www.iccwbo.org](http://www.iccwbo.org)]

The ICC is perhaps the premier organization for international arbitration, however, its Internet site is limited and contains very basic information on ICC services such as commercial and marine arbitration and conciliation. The most useful aspect of the site is that it contains sample arbitral clauses in a variety of languages.

**American Arbitration Association** [[www.adr.org](http://www.adr.org)]

The AAA site contains extensive information on arbitration in a number of practice areas including international law. The international law section contains full text of agreements and conventions, in addition to recent articles published on the topic of international arbitration. While the site provides the arbitration rules and services of the AAA, the most useful option allows the user to search a database of neutral arbitrators who are available in every state. The database includes a professional and biographical information on each arbitrator.

**International Trade Law Project Arbitration Page** [[ananse.irv.uit.no/trade'law/nav/arbitration.html](http://ananse.irv.uit.no/trade%27law/nav/arbitration.html)]

As with many other international practice areas, the ITL page on arbitration is a thorough source for legal research, containing full text versions of the rules of the ICC, the London Court of Int'l Arbitration, and the American Arbitration Association, as well as the U.N. Convention on the Recognition and Enforcement of Arbitral Awards, the UNCITRAL Arbitration Rules, and the rules of the International Center for Investment Disputes.

**Hieros Gamos Comprehensive Legal Site Arbitration Page** [[www.hg.org/adr.htm](http://www.hg.org/adr.htm)]

Although this site also contains full text versions of the important arbitral rules, conventions, and documents, it is most useful as a source of private ADR service providers who operate in Europe and the United States.

**Permanent Court of Arbitration at the Hague** [[www.law.cornell.edu/icj/pca/eng/home.html](http://www.law.cornell.edu/icj/pca/eng/home.html)]

The PCA is an arbitral body primarily used for disputes between states, although the court may be used for disputes between a state and a private party. This is not the official site of the PCA, however, it contains all of the information on PCA rules and history.

**JAMS/Endispute - ADR Service Provider** [[www.jams-endispute.com](http://www.jams-endispute.com)]

This is the site of the largest national provider of alternative dispute resolution services and allows the user to search a database of available panelists which contains professional and biographical information.

**Singapore International Arbitration Center** [[siac.tdb.gov.sg](http://siac.tdb.gov.sg)]

This site is devoted to arbitration using the Singapore Arbitration Center. It includes the rules of the center and a list of arbitrators available in Asia, Australia, and the United States.

**The Internet Arbitrator** [[www.angelfire.com/free/arbitrate.html](http://www.angelfire.com/free/arbitrate.html)]

The Internet arbitrator is a site run by an attorney who claims to provide free binding arbitration services over the Internet for individuals with disputes below \$5,000. Disputes over \$5,000 require a retainer and fee agreement. Arbitration is carried out primarily through the use of e-mail.

Finally, there were two sites which are worth exploring which could not be reviewed due to apparent network difficulties on the Internet. The first is the site of the non-profit **Commercial Arbitration and Mediation Center for the Americas**, an organization set up to promote and handle commercial disputes arising between businesses located in the NAFTA signatories. The second is the **Global Arbitration and Mediation Association**, an on-line company set up to promote arbitration over the Internet. Addresses for both sites can be found in the law section at **[www.yahoo.com](http://www.yahoo.com)**.

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*C a l i f o r n i a*

# INTERNATIONAL LAW

*Section Newsletter*

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## **NON-SECTION ACTIVITIES OF INTEREST**

Thanks, Tom! Tom Bennett, the new Associate Editor of the Newsletter, has assembled this great list of non-section activities that we hope you will find of interest.

For suggestions or comments, please contact Tom as follows:

Thomas Rae Bennett, Esq.  
Bank of America, Legal Department  
555 California Street, 8th Floor  
San Francisco, CA 94104  
415-622-8739  
415-622-2447 fax

## **LOCAL BAR ACTIVITIES**

**Orange County Bar Association**  
**The Normalization of U.S./Vietnam Economic and Political Relations**  
**Monday, April 21, 1997**

The Orange County Bar Association's International Law Section's bimonthly luncheon meeting will feature Quoc Minh Vuong, Attorney and Consultant, San Diego and Ho Chi Minh City. The meeting will be held at the Airport Hilton, 18800 Macarthur Blvd., Irvine, California (across from John Wayne Airport), during the International Law Section's regularly scheduled luncheon meeting on April 21, from 12:00 - 1:30 p.m. For further information, contact Richard Schwarzstein, Chair OCBA-ILS. Tel: 714/752-9152.

## **OTHER ACTIVITIES OF INTEREST**

**Union International des Avocats**  
**XLI Congress - Philadelphia, Pennsylvania**  
**September 3-7, 1997**

The forty-first Congress will bring together more than 1,000 delegates. Three main themes will be considered in depth: Lifting the judicial curtain: High Court Judges from around the world decide a constitutional case; The Role of the Lawyer in the Defense of Human Rights; and Practicing International Law in the Age of the World Wide Web.

The UIA is a non-profit organization which aims to foster the development of legal knowledge and practice in all fields of law; to bring together lawyers and lawyers' associations from all parts of the world for discussion and exchange of ideas; and to promote fundamental principles of the legal profession, especially independence, protection of human rights and the upholding of the rule of law. For information, contact: Siège Administratif UIA - 25, Rue Du Jour - 75001 Paris (France) Tel.: +33(01)45 08 82 34 - Fax: +33(01) 45 08 82 31, or Email: 100771.2060@compuserve.com.

**American Society of International Law  
91st Annual Meeting - Washington D.C.  
April 9-12, 1997**

This year's annual meeting, Implementation, Compliance and Effectiveness will be held at the Ana Hotel. Implementation focuses on the methods by which states transform international obligations into something acceptable within domestic legal systems. Compliance studies look beyond formal implementation measure to whether states actually abide by procedural or substantive international obligations, regardless of what domestic law indicates. Effectiveness goes beyond either implementation or compliance, e.g., whether an international norm, as in a treaty, actually achieves its stated objectives or addresses the underlying problems that inspired its creation. Participants at the meeting will analyze these phenomena and consider the fundamental question: Does international law have any real world effect? For information contact: ASIL Services Group, Tel: 202/939-6000; Fax: 202/797- 7133.

**American Bar Association  
Section of International Law and Practice  
1997 Section Spring Meeting  
April 30-May 3, 1997**

The New Globalizing Economy: Risks, Challenges and Practical Solutions: The Spring meeting, to be held at the Capital Hilton Hotel in Washington, D.C. will include presentations on such topics as free trade in the Americas, legal issues involved in the transition of Hong Kong, certification as a non-tariff barrier to U.S. - Russian trade, new environmental rules for international projects, and a host of other topics. For further information, call (202) 662-1671.

**American Bar Association  
Section of International Law and Practice & Center for Continuing Legal Education  
Arbitration of International Commercial Disputes  
Chicago, Illinois  
April 11, 1997**

The Section of International Law and Practice has convened a panel of experts in this field who represent a wide array of views on the most frequently asked questions such as: Whether or not to arbitrate; whether arbitration should be under an administered system or ad hoc; use of domestic or international rules; and whether it should be governed by prescribed domestic or foreign law

A moot arbitration will also be presented for the purpose of comparing the rules and practices of the principal international arbitral systems. For further information, call 312/988-6216.

**Whittier Law School  
14th Annual International Law Symposium  
Enforcing International Human Rights Law  
April 4, 1997**

This one-day symposium, to be presented at Whittier Law School, 5353 W. Third St., Los Angeles, will include the following topics: Enforcement of International Human Rights Law in United States Courts; Prosecution of Nazi War Criminals in the United States, Canada and France; The Current Status of the Yugoslav War Crimes Tribunal; The Proposed International Criminal Court; and The Work of Truth Commissions in Latin America, Eastern Europe and South Africa. For further information call Karl Friedrich (213) 938-3621

**MSU Center for International Business  
China Conference - Call for Papers  
June 25-28, 1997**

The Montclair State University Center for International Business has made a call for papers for the upcoming conference in Beijing, International Business with China - Challenges & Opportunities. The broad list of suggested topics includes taxation, investment, technology transfer, joint ventures, intellectual property, distribution and marketing planning, cross cultural communication, China and the WTO, foreign trade, APEC,

and more. For further information on attending the conference or submitting a research paper, contact Dr. Carl Rodriques, Dept. of Management, School of Business, MSU, Upper Montclair, NJ 07043. Tel: 201/655-7455; Fax: 201/655-7715; or via E-mail: [rbll@qsilver.queensu.ca](mailto:rbll@qsilver.queensu.ca).

**Inter-Pacific Bar Association  
Annual Meeting - Kuala Lumpur  
April 28-May 2, 1997**

The IPBA's Seventh Annual Meeting and Conference will be held in Kuala Lumpur. The IPBA was formed at an organizational conference in Tokyo in 1991 attended by over 500 lawyers from throughout Asia and the Pacific and has since grown to over 2,000 members, becoming the pre-eminent legal organization in the region for business and commercial lawyers. The conference will feature an opening session entitled WTO and Its Implications for the Asia Pacific Region, with 26 programs with over 150 speakers from throughout the Pacific Rim. More than 600 lawyers are expected to attend this conference. For more information concerning the conference, contact the Kuala Lumpur Host Committee at P.O. Box 1038, 50704 Kuala Lumpur, Malaysia or fax to 60-3-238-5625.

**Border Trade Alliance  
Second National Conference  
April 26-29, 1997**

The San Diego Chapter of the Border Trade Alliance, an influential grassroots border advocacy organization on the South-West border, will hold the second of its four national conferences at the Hotel Washington in Washington, D.C. Participants will visit key legislators in Congress and Administration officials to discuss South-West border issues. Topics include the NAFTA review and the Intermodal Surface Transportation Efficiency Act Reauthorization. The conference is an opportunity for California business leaders involved in international trade to voice concerns about border issues with the support of the BTA. Call (800) 333-5523 for registration information. Conference agendas will be available at the end of March.

**American Management Association  
Doing Business with Series  
Business Skills for the China Market  
San Francisco  
March 10-12, 1997**

This seminar will provide hands-on guidance to enable you to: Adapt Western business skills to win in Chinese markets; Learn how Chinese distribution systems operate; Identify effective marketing strategies to reach Chinese customers And build brand loyalty; Build a supportive "guan xi" network of Chinese contacts; Find winning joint venture partners; Assess the costs and benefits of manufacturing in China; Avoid tricky legal pitfalls and resolve differences without arbitration. To register, call 1-800-262-9699.

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